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248027—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS J. FALLON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on June 26, 1940, reversing the conviction of the respondent in the United States District Court for the Southern District of New York.

OPINION BELOW

The opinion of the court below (R. 280–281) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals, reversing the conviction of the respondent, was entered June 26, 1940 (R. 281). The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether the recording of a telephone conversation, with the authorization of one party thereto, on a recording apparatus attached to an extension line, constitutes a violation of Section 605 of the Federal Communications Act.

STATUTE INVOLVED

Section 605 of the Federal Communications Act (c. 652, 48 Stat. 1064, 1103, 47 U.S.C., Sec. 605) provides in part as follows:

> * * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *

STATEMENT

Respondent was indicted for committing perjury in his testimony before a grand jury investigating the activities of former Circuit Judge Martin T. Manton. The first count of the indictment charged that respondent testified falsely before the grand jury on March 13, 1939, when he denied that he had discussed the investigation with one Alfred Reilly, and when he denied that he had

advised Reilly to destroy records pertaining to the investigation. The second count of the indictment charged that on March 30, 1939, respondent again testified falsely before the grand jury. Six assignments of perjury are set forth in this count; basic to all is respondent's denial in his testimony before the grand jury of having talked over various aspects of the investigation with Reilly. (R. 3–6.)

At the trial, Reilly testified to having had several telephone conversations with respondent concerning the investigation, during the course of which respondent had advised him to destroy various records pertaining to the investigation (R. 40). Typewritten transcripts of two of the telephone conversations were admitted in evidence and read to the jury (R. 126–127). Both tended to contradict the testimony given by respondent before the grand jury (R. 243–255). When respondent testified in his own behalf at the trial, he admitted that the transcripts correctly set forth his conversations with Reilly (R. 156–157).

The transcripts were made under the following circumstances: Reilly, who was involved in one of the cases before Judge Manton which was being investigated by the grand jury, had decided to cooperate with the Government (R. 33–34). Because Reilly was nervous, the United States Attorney asked him if he would like to have a Federal Bureau of Investigation agent stay with him for a couple of weeks (R. 34). Reilly said that he would ap-

preciate this, and an agent was assigned to remain with him at his home (R. 34).

Thereafter Reilly agreed with the F. B. I. agent that a recording apparatus should be installed in his home so that records of telephone conversations could be made (R. 35, 102). Reilly felt that he would rather have the truth of whatever he said recorded than leaving it a matter for conjecture (R. 35). Accordingly, a recording device was installed, with the consent of Reilly, in the basement of his house (R. 36, 121). Pursuant to a previous agreement with respondent (R. 36, 69), Reilly then telephoned him and the conversation was recorded by an F. B. I. agent with the knowledge and consent of Reilly (R. 36). On the following day, again pursuant to agreement with respondent (R. 36, 39), Reilly again telephoned him and this conversation, too, was recorded by the F. B. I. agent with Reilly's knowledge and consent (R. 39). Typewritten transcripts of the records of both conversations were subsequently made (R. 123, 243–255). These were the transcripts which were introduced in evidence and read to the jury (R. 126–127). The recordings were also introduced in evidence (R. 126), but they were not played to the jury.

The jury found the respondent guilty (R. 220) and he was sentenced to imprisonment for nine months (R. 2). On appeal to the court below, the judgment of conviction was reversed, Judge Clark dissenting, on the sole ground that the transcripts

of the telephonic communications were improperly received in evidence (R. 280–281).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding that the recording of a telephone conversation with the authorization of one party thereto, on a recording apparatus attached to an extension line, is an "interception" within the meaning of Section 605 of the Federal Communications Act.

2. In holding that under Section 605 of the Federal Communications Act one party to a telephone conversation, without the consent of the other, cannot validly authorize a Government agent to overhear, record, and divulge such conversation.

3. In holding as a matter of law that a person who, with the consent of one party to a telephone conversation, listens to such conversation, cannot testify to the substance of the conversation over the objection of the other party to the conversation.

4. In reversing the judgment of conviction.

REASONS FOR GRANTING THE WRIT

This case was decided by the court below on the authority of *United States* v. *Polakoff*, in which a petition for certiorari is being filed herewith, No. —, present Term. Since the issue in this case is precisely the same as that in the *Polakoff* case, we

respectfully refer the Court to our petition in the *Polakoff* case for a statement of the reasons for granting the writ here.

CONCLUSION

We respectfully submit that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

JULY 1940.

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